STATE OF MICHIGAN

COURT OF APPEALS

LARRY M. LEDESMA,

Plaintiff-Appellant,

v

CONSUMERS ENERGY and NUCLEAR MANAGEMENT CO., LLC,

Defendant-Appellees.

UNPUBLISHED
July 5, 2005

No. 253359
Jackson Circuit Court
LC No. 01-003211-CZ

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

HOEKSTRA, J., *(concurring in part and dissenting in part).*

Although I join with the majority in affirming the trial court's grant of summary disposition of plaintiff's disparate treatment claim, I respectfully disagree that the trial court improperly dismissed plaintiff's hostile work environment claim and would affirm the grant of summary disposition of that claim as well.

At issue regarding plaintiff's claim for hostile work environment is whether plaintiff was subjected to unwelcome communication or conduct based on his race and, if so, whether this communication or conduct was sufficiently severe or pervasive to create a hostile work environment. See *Quinto v Cross & Peters Co,* 451 Mich 358, 368-369; 547 NW2d 314 (1996). To be subject to unwelcome communication or conduct, plaintiff must be aware of it; plaintiff cannot rely on instances of alleged racial conduct or communication of which he was not aware. See *Langlois v McDonald's Restaurants of Michigan, Inc,* 149 Mich App 309, 317; 385 NW2d 778 (1986). Thus, although there is evidence of incidents of discrimination and hostile work environment experienced by a number of others at the plant,[1] the proper focus is on plaintiff's

[1] I note that this evidence arises, in part, from the peculiar procedural history of this case. Plaintiff's claims were originally filed, along with the claims of seventeen other minority plaintiffs, as part of a single multi-plaintiff case. However, the trial court ordered the claims severed into individual actions for each plaintiff. Afterward, eighteen individual actions, including this case, were re-filed, but each of the individual complaints that were filed was identical to the original multi-plaintiff complaint; only the caption was changed to omit the names of the other individual plaintiffs. No effort was made to individualize the complaints to the circumstances of the named plaintiff.

own deposition testimony about the communication and conduct of which he was either aware or to which he was himself subjected. *Id*.

At his deposition, plaintiff testified that unwelcome and derogatory comments had been made to him about being Hispanic, such as "it is time for your siesta" and "don't you take a siesta about this time," and calling him Poncho, Chico, or Taco. In addition, plaintiff objected to certain communication and conduct directed at African-American coworkers. Plaintiff testified that he had heard name-calling directed at African-American employees, including use of racial epithets. He did not report these comments, but his supervisors were aware of them. Plaintiff also testified that he was present when a supervisor used a racial epithet in a conversation about other employees and that the supervisor was fired as a result of this conduct. In addition, plaintiff testified that he had heard that several nooses had been found at the plant, including one made by a security guard, and that he felt personally intimidated by these noose incidents.

Whether an environment is hostile is to be determined by looking at all of the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating or is merely comprised of "offensive utterances," and whether the conduct complained of unreasonably interferes with an employee's work performance. *Quinto, supra* at 370 n 9, citing *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993). Although I do not dispute the improper and offensive nature of the conduct cited by plaintiff, this Court has previously held that a claim for hostile work environment becomes actionable only when "'sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question." *Langlois, supra*. On the facts of this case, I agree with the trial court that the evidence of communication or conduct directed at employees of a different race, even when combined with occasional remarks relating to plaintiff's own ethnicity, is insufficient to establish a hostile work environment with respect to this plaintiff. Consequently, I would affirm the trial court's grant of summary disposition of plaintiff's claim for hostile work environment.

/s/ Joel P. Hoekstra